

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Accelerating Wireline Broadband	)	WC Docket No. 17-84
Deployment by Removing Barriers to	)	
Infrastructure Investment		

**JOINT COMMENTS OF VARIOUS OREGON ELECTRIC UTILITIES**

Pursuant to sections 1.415 and 1.419 of the Federal Communications Commission’s (“FCC” or “Commission”) Rules, Portland General Electric Company (“PGE”), the Oregon People’s Utility District Association (“OPUDA”), the Oregon Rural Electric Cooperative Association (“ORECA”), the Oregon Municipal Electric Utility Association (“OMEU”), Eugene Water & Electric Board (“EWEB”), Idaho Power Company (“IPC”), and PacifiCorp (hereinafter collectively referred to as the “Oregon Electric Utilities” or “OEU”) hereby jointly submit these Comments to address questions and issues raised in the Commission’s Notice of Proposed Rulemaking (“NPRM”) and Notice of Inquiry (“NOI”) released in the above-referenced proceeding on April 21, 2017.<sup>1</sup>

Through its seven signatory parties, the OEU collectively represent thirty-nine (39) electric utilities – including investor-owned utilities, consumer-owned utilities, and government entities – which operate in Oregon. OEU members share the goal of providing safe, reliable electric service to their respective communities on a cost-effective basis, while at the same time providing attachers with non-discriminatory access to poles, ducts, conduit, and other similar facilities for purposes of constructing and maintaining wireline attachments.

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<sup>1</sup> Notice of Proposed Rulemaking, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* (Released April 21, 2017).

OEU's collective experience in constructing, operating, and maintaining electric transmission and distribution systems is expansive, and for a number of years, its members have gained invaluable experience managing telecommunications attachments made predominately to the distribution poles within their respective distribution systems. OEU members operate in areas which are significantly diverse in terms of population density, terrain, and climate. These areas include metropolitan centers, residential and business districts, agriculturally-based communities, and rural areas throughout Oregon. Throughout this proceeding, OEU encourages the Commission to take into account that electric utilities are each situated differently -- and thus different challenges and opportunities exist as each utility maintains its system and provides access for pole attachments. Notwithstanding their unique challenges, the OEU members have found a successful path forward, and through these Comments, OEU wishes to provide information regarding Oregon's pole attachment rules<sup>2</sup>, which are founded on safety and collaboration.

#### **I. Success depends upon the Commission being a Proponent of Safety**

OEU appreciates the Commission's stated interest in seeking to develop an approach that balances the legitimate needs and interests of new attachers, existing attachers, utilities, and the public.<sup>3</sup> However, OEU feels strongly that the Commission's efforts to accelerate the deployment of next-generation networks and services should not be at the expense of safety. OEU's comments are intended to assist the Commission in accomplishing its stated goal: to work toward an approach that facilitates new attachments without creating undue risk of harm.<sup>4</sup>

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<sup>2</sup> The Oregon Public Utility Commission is certified by the FCC to regulate pole attachments in Oregon.

<sup>3</sup> NPRM at ¶ 6.

<sup>4</sup> *Id.*

To accomplish its stated goal, the Commission should endorse the National Electrical Safety Code (“NESC”)<sup>5</sup> through Commission policy and rules. The NESC represents broad industry perspectives, and its purpose is the “practical safeguarding of persons and utility facilities during the installation, operation, and maintenance of electric supply and communications facilities...”<sup>6</sup> It is worthy of note that, the membership of the NESC Committee is composed of national and international organizations and is certified by the American National Standards Institute (“ANSI”) as having an appropriate balance of the interests of members of the public, utility workers, regulatory agencies, and the various types of private and public utilities.”<sup>7</sup> By adopting the NESC, the Commission will promote worker and public safety in a meaningful manner. This is crucial, particularly if it is committed to successfully increasing the speed of access and volume of attachments to utility poles.

As described in greater detail below, OEU offers Comments on our state experience with regard to pole attachments, current timeframes for the consideration of pole attachment applications, and the make-ready process, pursuant to the Commission’s request.<sup>8</sup> Oregon’s rules balance speed of access to utility poles and fully embrace safety and the NESC.

## **II. Oregon’s Rules Offer a Reasonable Balance Between Attachers and Pole Owners**

Oregon’s pole attachment rules are the product of collaboration between the Oregon Public Utility Commission (“OPUC”) and the Oregon Joint Use Association (“OJUA”). The OJUA is a non-profit industry work group with cable, CLEC, ILEC, electric utility, and municipal government representation. Oregon’s rules were amended through a rulemaking in

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<sup>5</sup>2017 Edition of the National Electrical Safety Code released August 1, 2016, by IEEE.

<sup>6</sup> See NESC Rule 010A.

<sup>7</sup> See NESC Section 1. Introduction to the National Electrical Safety Code.

<sup>8</sup> NPRM at ¶ 8: “We seek comment on, and examples of, current timelines for the consideration of pole attachment applications, especially in states that regulate their own rates, terms, and conditions for pole access.”

2006-2007 and have an effective date of April 16, 2007.<sup>9</sup> It should also be noted that certain Oregon rules are considered mandatory while other rules are not.<sup>10</sup> With regard to rules which are not mandatory, parties may mutually agree on terms that differ from them, however, in the event of disputes submitted for OPUC resolution, the OPUC will deem the rates, terms and conditions specified in the agreement between the parties as presumptively reasonable.<sup>11</sup> Nonetheless, the burden of proof is on any party advocating a deviation from the OPUC's rules.<sup>12</sup>

### *Application Review*

The Commission seeks comment on, and examples of, current timelines for the consideration of pole attachment applications, and terms, and conditions for pole access.<sup>13</sup> Oregon's rules require that the pole owner provide written or electronic notice to the applicant within 15 days of the application receipt date, confirming receipt of the application and listing any deficiencies with the application, including missing information. If any required information is missing, the pole owner may suspend processing such application until the missing information is provided.<sup>14</sup> Upon receipt of a completed application, the pole owner must reply in writing or electronically to the applicant "as quickly as possible and no later than 45 days from the date the completed application is received."<sup>15</sup> The owner's reply must state whether the

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<sup>9</sup> See *Rulemaking to Amend and Adopt Rules in OAR 860, Division 024 and 028, Regarding Pole Attachment Use and Safety (AR 506) and Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles and Facilities (AR 510)*, Order No. 07-137, 2007.

<sup>10</sup> See Oregon Administrative Rule ("OAR") 860-028-0050(3). Oregon's mandatory rules include 860-028-0060 through 860-028-0080, 860-028-0115 (Duties of Structure Owners), and 860-028-0120 (Duties of Pole Occupants).

<sup>11</sup> See Oregon Revised Statute 757.285: Presumption of reasonableness of rates set by private agreement. Agreements regarding rates, terms and conditions of attachments shall be deemed to be just, fair and reasonable, unless the Public Utility Commission finds upon complaint by a public utility, telecommunications utility, consumer-owned utility or licensee party to such agreement and after hearing, that such rates, terms and conditions are adverse to the public interest and fail to comply with the provisions hereof.

<sup>12</sup> See Oregon Administrative Rule ("OAR") 860-028-0050(3).

<sup>13</sup> See *supra* note 7.

<sup>14</sup> See 860-028-0100(3).

<sup>15</sup> See 860-028-0100(4).

application is approved, approved with modifications or conditions, or denied.<sup>16</sup> As stated previously, Oregon's rules are a product of collaboration and the foregoing timeframes reflect a reasonable balance between the needs of pole owners and attachers.

Additionally, the Commission has indicated that it seeks comment on retaining the existing Commission rule allowing utilities 15 extra days to consider pole attachment applications in the case of large orders.<sup>17</sup> Oregon's rules provide that if an application involves more than the threshold number of poles<sup>18</sup> the parties must negotiate a mutually satisfactory longer time frame to complete the approval process.<sup>19</sup> In this regard, Oregon's rules recognize that electric utilities are situated differently, and thus, the amount of time it takes could vary on a project by project basis. Accordingly, the OEU would encourage the Commission to consider modifying its existing rule so as to be less rigid, and more flexible to adapt to the complexities confronted by the utility that is processing a large order.

#### *Make Ready*

The Commission also seeks comment on approaches to shorten the make-ready work timeframe.<sup>20</sup> Oregon's rules provide that if a pole owner approves an application that requires make ready work, the owner will perform such work at the applicant's expense. This work must be completed in a timely manner and at a reasonable cost. Where this work requires more than 45 days to complete, the parties must negotiate a mutually satisfactory longer period to complete the make ready work.<sup>21</sup> Once again, this timeframe was established through industry collaboration and provides a reasonable timeframe for attachers and pole owners. By and large,

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<sup>16</sup> *Id.*

<sup>17</sup> NPRM at ¶ 9.

<sup>18</sup> See 860-028-0020(32). Oregon defines the threshold number of poles as 50 poles, or one-tenth of one percent of the owner's poles, whichever is less, over a 30 day period.

<sup>19</sup> See 860-028-0100(7).

<sup>20</sup> NPRM at ¶ 11.

<sup>21</sup> See 860-028-0100(45).

OEU members adhere to the 45 day timeframe most of the time. However, situations do arise, which may require a longer timeframe to complete the work, including, by way of examples: pole replacements involving scheduled power outages; physical access constraints during certain times of the year in rural areas; permitting constraints associated with the placement of new facilities and construction;<sup>22</sup> and power restoration efforts that may take precedence over new attachments following extreme weather events.

Further, the Commission has posed questions as to whether there are ways that it can eliminate or significantly reduce the need for make ready work.<sup>23</sup> OEU urges the Commission to exercise caution when examining alternatives to address this issue, as make ready all too often correlates directly to safety and/or reliability of service, not only for the carrier deploying broadband facilities, but also the pole-owning utility and other attachers on such poles. For example, a common form of make ready involves the electric utility rearranging its facilities to create (or maintain) a communication-worker safety zone (“CWSZ”) on the pole, in accordance with NESC requirements.<sup>24</sup> The CWSZ is intended to safeguard such communication workers from the potential hazards associated with working in close proximity to energized electrical facilities. Coincidentally, it is worthy of mention that pole capacity relates to both space on the pole as well as the strength of the pole.<sup>25</sup> Thus, if a pole does not have adequate strength to accommodate a new attachment, the only solution may be to replace the pole.

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<sup>22</sup> Generally speaking OEU members are required to obtain utility permits to construct facilities along state, county, or municipal right-of-way --and on federal lands governed by the Bureau of Land Management or the United States Forest Service.

<sup>23</sup> See *supra* note 18.

<sup>24</sup> See NESC Rule 235 and Rule 238.

<sup>25</sup> See NESC Section 26 Strength requirements.

### *Alternative Pole Attachment Processes*

The Commission seeks comment on potential remedies, penalties, and other ways to incent utilities, existing attachers, and new attachers to work together to speed the pole attachment timeline.<sup>26</sup> Oregon’s rules contain mandatory “Duties of Structure Owners” and “Duties of Pole Occupants” which set forth clear expectations and provide a reasonable balance for all parties.<sup>27</sup> Furthermore, Oregon was quick to realize that unauthorized or non-compliant attachments pose increased risks and can compromise the safety and reliability of the electric system – not to mention inhibit speed and access to utility poles by responsible attachers. Oregon’s sanction rules provide for a \$500 per pole sanction if the attachment is made without a contract with the pole owner;<sup>28</sup> \$100 per pole plus five times the current rental rate for unauthorized attachments discovered by the pole owner;<sup>29</sup> five times the current rental rate for unauthorized attachments reported by the attacher;<sup>30</sup> and a \$200 per pole sanction if the attacher fails to adhere to safety rules, the issued attachment permit, or the contract.<sup>31</sup> Please note that safe harbor provisions also exist with respect to the latter sanctions category. Specifically, as it relates to newly-constructed and newly-permitted attachments, the pole owner is not authorized to apply sanctions if the attacher corrects the violation in a timely manner.<sup>32</sup> Further, sanctions will not be charged if the violation is discovered in a joint post-construction inspection conducted by the pole owner and the licensee together, and is corrected by the licensee within 60

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<sup>26</sup> NPRM at ¶ 13.

<sup>27</sup> See 860-028-0115 and 860-028-0120.

<sup>28</sup> See 860-028-0130.

<sup>29</sup> See 860-028-0140.

<sup>30</sup> *Id.*

<sup>31</sup> See 860-028-0150.

<sup>32</sup> See 860-028-0150(5): Notwithstanding the timelines provided for in section (3) of this rule, a pole owner must notify the occupant immediately of any violations occurring on attachments that are newly-constructed and newly-permitted by the occupant or are caused by the occupant’s transfer of currently-permitted facilities to new poles. The occupant must immediately correct the noticed violation. If the violation is not corrected within five days of the notice, the pole owner may immediately impose sanctions.

calendar days of the joint post-construction inspection or within a mutually-agreed upon time.<sup>33</sup>

Additionally, if the licensee performs an inspection and requests a joint post-construction inspection, the pole owner's consent to such inspection must not be unreasonably withheld.<sup>34</sup>

Notably, sanctions have inspired working relationships between attachers and pole owners throughout Oregon which further promotes collaboration and a culture of safety and compliance.

#### *One-Touch, Make-Ready*

The Commission seeks comment on the potential benefits and drawbacks of a pole attachment regime patterned on a "one-touch, make-ready" ("OTMR") approach.<sup>35</sup> While OTMR is not standard industry practice in Oregon, it could create efficiency particularly as it relates to make ready work in the communications space involving existing pole attachers. However, the OEU feels strongly that if OTMR were adopted, it would require oversight by the pole owner, specifically including post-construction inspections of all contractor work, to assess: the quality of workmanship; compliance with the pole attachment permit and contract; and compliance with NESC and other applicable safety rules. In OEU's opinion, the new attacher should be held solely accountable to ensure that compliance is achieved. Finally, it would be important to pole owners, like the members of OEU, to secure contractual guarantees from the new attacher, including: an assumption of liability for negligence or willful misconduct; a commitment to defend, indemnify and hold harmless the pole owner for any liabilities associated with the new attacher's OTMR; and a surety bond or other form of security in case the existing attachments are damaged.

#### *Re-examining Rates for Make-Ready Work and Pole Attachments*

OEU members vigorously oppose the Commission's proposals to shift make ready and

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<sup>33</sup> See 860-028-0150(5)(b).

<sup>34</sup> See 860-028-0150(5)(c).

<sup>35</sup> NPRM at ¶ 21.



pole attachment costs from attachers to electric ratepayers.<sup>36</sup> There is simply no sound policy justification to increase electric rates in hopes of accelerating the deployment of next-generation networks by profit-seeking enterprises. Even if a policy analysis made sense in this regard, which it does not, the FCC is completely removed from fully understanding, considering, or representing the interests of electric ratepayers. Therefore, the Commission should not alter make ready and pole attachment rental rate methodologies which have withstood decades of scrutiny by all parties, including attachers, pole owners, and the Commission.

### **III. Notice of Inquiry**

In the NOI the Commission seeks comment on whether under § 253<sup>37</sup> it should adopt rules preempting fundamental state and local authority with regard to pole attachment related rights-of-way negotiations and approval processes;<sup>38</sup> deployment moratoria;<sup>39</sup> rights-of-way, permitting, licensure fees, *etc.*<sup>40</sup> OEU members concur with EEI, that the FCC cannot, and should not attempt to, do so. The Pole Attachment Act was not intended to result in federal preemption of the entire field of state and local regulations pertaining to capacity, safety, reliability, and engineering. Instead, the statute was intended to fill gaps only with respect to matters that were not directly regulated by some states, namely pole attachments rates and terms and conditions.<sup>41</sup> Moreover, the FCC cannot use its Section 253 authority in states, like Oregon, that regulate pole attachments under Section 224(c).<sup>42</sup> Section 224(c) states that nothing in the section “shall . . . give the commission jurisdiction with respect to rates, terms, and conditions, or

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<sup>36</sup> NPRM at ¶ 32-42.

<sup>37</sup> 47 U.S.C. § 253

<sup>38</sup> NOI at ¶ 103.

<sup>39</sup> *Id.* at ¶ 102.

<sup>40</sup> *Id.* at ¶ 104.

<sup>41</sup> See Communications Act Amendments of 1978 S. REP. NO 95-580, at 123 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 124 (stating FCC’s regulatory authority over pole attachments is “strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems”).

<sup>42</sup> NOI at ¶ 108.

access to poles, ducts, conduits, and rights-of-way . . . for pole attachments in any case where such matters are regulated by a State.”<sup>43</sup> Likewise, Section 224(a)(1) provides that cooperatives and states and municipalities are not subject to the FCC’s pole attachment authority.

As an alternative course, the OEU encourages the Commission to recognize the benefits that many state and local laws have had in terms of promoting broadband deployment.<sup>44</sup> The OJUA, for example, was created and functions as a resource that builds trust, cooperation, networking opportunities, and organizational affiliations between pole owners, attachers, and government entities, all of which facilitate the safe and efficient joint use of poles. The OJUA provides education regarding pole attachment best practices and NESC compliance. The OJUA’s annual training event is attended by hundreds of construction personnel, engineers, and joint use administrators. The OJUA’s Conflict Resolution Committee provides non-binding opinions concerning pole attachment disputes in lieu of (or in advance of) formal OPUC complaint proceedings. The OJUA serves as an advisor to the OPUC and Oregon’s rules reflect years of collaboration. We encourage the Commission to take notice of the value that such industry partnerships can provide. There is no rule or regulation which can accomplish as much as a productive working relationship.

## CONCLUSION

**WHEREFORE**, the OEU members respectfully request that the Commission consider these joint comments in the context of their deliberations throughout this proceeding.

[SIGNATURES OF THE RESPECTIVE “OREGON ELECTRIC UTILITIES” FOLLOW]

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<sup>43</sup> 47 U.S.C. § 224 (c).

<sup>44</sup> NPRM at ¶ 100: “We seek comment on whether we should enact rules, consistent with our authority under Section 253 of the Act, to promote the deployment of broadband infrastructure by preempting state and local laws that inhibit broadband deployment.”

Respectfully Submitted,

**PORTLAND GENERAL ELECTRIC**

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Respectfully Submitted,

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Respectfully Submitted,

**OREGON RURAL ELECTRIC  
COOPERATIVE ASSOCIATION**



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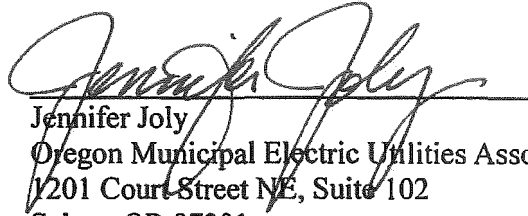
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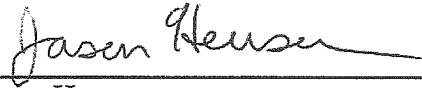
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Respectfully Submitted,

**EUGENE WATER & ELECTRIC BOARD**

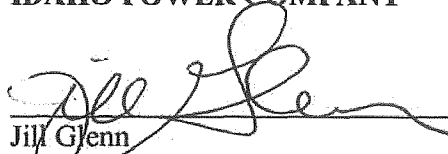
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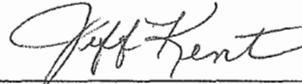
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Respectfully Submitted,

**PACIFICORP**

A handwritten signature in cursive script that reads "Jeff Kent". The signature is written in dark ink and is positioned above a horizontal line.

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